United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-2491 and 74-2308

In the

United States Court of Appeals

For the Second Circuit

FIRESTONE PLASTICS COMPANY, A DIVISION OF THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner-Intervenor,

and

UNION CARBIDE CORPORATION,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR and PETER J. BRENNAN, SECRETARY, U.S. DEPARTMENT OF LABOR, and JOHN H. STENDER, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR

REPLY **BRIEF FOR PETITIONERS-INTERVENOR**

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UNITED STATES DEPARTMENT OF LABOR and PETER J. BRENNAN, Secretary, U. S. DEPARTMENT OF LABOR, and JOHN H. STENDER, Assistant Secretary of Labor for Occupational Safety and Health,

Respondents.

On Petitions for Review of an Order of the Occupational Safety and Health Administration, United States Department of Labor

REPLY BRIEF FOR PETITIONERS-INTERVENOR

No doubt because the Assistant Secretary's determinations with respect to the final standard regulating exposure to VCM are not supported by substantial evidence in the record considered as a whole, government counsel has violated the express holdings of Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169 (1962)[1/] and N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438, 443-44 (1965), by advancing reasons in support of the determinations that were not relied on by the Assistant Secretary himself. In view of the lack of any evidence to support the Assistant Secretary's determinations with respect to the technological and economic feasibility of attaining the permissible exposure level required by the standard, post hoc rationalizations by government counsel might be dismissed as excusable zeal. What is not excusable in these proceedings, however, is government counsel's distortion of the record, in a manner bordering on an attempt to deliberately deceive this Court, with respect to both the technological and medical and scientific data submitted to the Assistant Secretary by Firestone particularly, and others.

1/ "The courts may not accept appellate counsel's post hoc rationalizations for agency action; [Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

> '[A] simple but fundamental rule of administrative law * * *is * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action * * *.'"

I.

THE GOVERNMENT AND UNIONS' BRIEFS, AS DID THE ASSISTANT SECRETARY BELOW, WITHOUT SUBSTANTIAL RECORD SUPPORT, IMPROPERLY RELY ON EXPERIMENTAL ANIMAL DATA AND IMPROPERLY DISREGARD THE HUMAN EXPERIENCE WITH VCM EXPOSURE IN SETTING THE PERMISSIBLE EXPOSURE LEVEL IN THE STANDARD

Despite the overwhelming and authoritative refutation of a scientific approach which bases assessment of a permissible level of human exposure to VCM by reliance on experimental animal data (as pointed out in our main brief (pp. 13-17)), nevertheless, the government's brief, as well as the brief for the American Federation of Labor and Congress of Industrial Organization and Industrial Union Department, AFL-CIO (hereinafter "Unions"), seek to justify the Assistant Secretary's determination with respect to the permissible human exposure level almost entirely by unwarranted, and conclusively rejected, reliance on experimental animal data. Instead of following the advice of Dr. Kuschner (J.A. 1900), Dr. Baden (J.A. 2001), and Dr. Gehring (J.A. 1250) that the relevant inquiry should be directed at the human experience, the government and Unions' briefs treat the experimental animal studies as establishing a certainty with respect to scientific knowledge about the health hazards of human VCM exposure that is contrary to the opinions of all scientists in these proceedings, including Dr. Selikoff (J.A. 487-90) and Dr. Standaert (J.A. 3732, 3735), as well as OSHA's Office of Planning, Evaluation and Research (J.A. 2991)

and the Final Environmental Impact Statement (J.A. 3285-93). Moreover, the government and Unions' briefs mount a totally unjustified attack on the human data submitted to OSHA. The tone of the government's brief is particularly disturbing in this context for the impression conveyed is clear; find some way, however specious, to get around the recent studies of humans exposed to VCM because those studies do not support the Assistant Secretary's position.

The primary thrust of both the government's and the Unions' position rests squarely on Dr. Standaert's admitted "assumption" that "man is at least as sensitive as the most sensitive mammalian species" (J.A. 3730).[2/] Yet the treatment of that "assumption" as conclusive fact by the government (p. 58) and the Unions' brief (p. 43) borders on impropriety because on this record the consensus of informed opinion was that man is considerably less susceptible to VCM induced cancer than mice (J.A. 276, 261, 615, 620, 1021, 1432; Tr. 1034). Even Dr. Schneiderman, whose statistical theories regarding projection of effects of VCM exposure on animals to man were refuted by everyone else in these proceedings (see our brief on

2/ Solely with respect to the experimental animal work, the government's brief attempts to leave the totally erroneous impression that the VCM inhalation experiments performed on rats by Dow Chemical Co. scientists in 1958 and 1959 was the last word on animal toxicology until Professor Viola's work in 1971 (see Br. 4, 33). In fact, experiments in 1963 by Lester, Greenberg and Adams did not confirm the conclusions of the Dow studies, finding no significant injury to have resulted to rats exposed to 500 ppm VCM (J.A. 3831). It should also be noted in this context that the liver damage to rats found in the Dow experiments was reversible (see government br. 4).

the merits, pp. 13-17),[3/] had to admit, in responding to the question as to whether effects on animals at a particular exposure level will be the same in humans at the same exposure, "I would be amazed if they were the same" (J.A. 276). Of course, the most telling omission in the government and Union presentations in this context is the opinion of Professor Maltoni, whose experimental work was so highly praised by the government and the Unions when its implications supported their preconceived positions, but who, nevertheless, cautioned the Assistant Secretary not to rely upon facile assumptions in evaluating animal data with specific reference to extrapolating the data to man (J.A. 3055-56).

Acceptance of the assumption that man is at least as susceptible to VCM induced cancer as mice is really only another way of applying Dr. Schneiderman's completely discredited statistical theories for extrapolating effects in animals to humans. As noted in our main brief (p. 16), OSHA's Office of Planning, Evaluation and Research recognized this clearly, because its rejection of Dr. Schneiderman's theories was based in part on the fact that those theories were based on the "unproven" hypothesis that "rat reaction to VCM exposure is at least as severe as human reaction" (J.A. 2991; emphasis added). Reliance by the Assistant

3/ In view of the record evidence in these proceedings, for the Unions' brief to characterize Dr. Schneiderman's statistical theories as "universally accepted toxicological principles" (Br. 43) totally misrepresents and distorts the evidence and strains credulity. The government's continued reliance on Dr. Schneiderman's theories (Br. 53) in view of the evidence in these proceedings rejecting those concepts is simply inexplicable.

Secretary, therefore, on the assumption that man is at least as susceptible as mice to VCM induced cancer is not only unsupported by substantial evidence but also is arbitrary and capricious, particularly because OSHA's Office of Planning, Evaluation and Research as well as the Final Environmental Impact Statement, after careful study of the informed scientific opinion, recommended rejection of the assumption.

Appellate advocacy, by both the government (Br. 12, 50-51) and the Unions (Br. 47), of the so-called "100 to 1" safety factor as a reason supporting the Assistant Secretary's determination to set the permissible exposure level specified in the final standard violates the rule of Burlington Truck Lines and Metropolitan Life Ins. Co., cited above. The Assistant Secretary nowhere specifically relied on this "safety factor" philosophy in promulgating the standard's permissible exposure limits. Furthermore, even if appellate advocacy of the "safety factor" point were not improper, its utilization by the Assistant Secretary in these proceedings would not have been supported by substantial evidence. Application of this device requires taking the no-effect level in animals and dividing it by a factor of 100, or 500, or 5000 (whichever number is currently in vogue) prior to extrapolating effects in animals to man. It is utilized in conjunction with experimental animal, rather than human, data, and is incorporated in, and an essential component of, the statistical models devised for extrapolating

no-effect levels in animals to man which were proposed by Dr. Schneiderman and rejected by all other scientists (J.A. 207-208). Dr. Gehring indicated, moreover, that "safety factor" reasoning is quite controversial among toxicologists and, as an example, referred to the fact that a pig given the same dose of penicillin as a human will die while the human will not; and commented that no one contends in that case that "safety factor" has any application (J.A. 1250). Finally, Dr. Selikoff aptly characterized this type of analysis as a "guess" (J.A. 478). The Assistant Secretary wisely refrained from reliance upon such discredited thinking and government counsel's totally improper resurrection of those ideas amply demonstrates the vacuity of its position.

As previously noted, much of the government and union effort herein, as well as that of the Assistant Secretary below is directed at finding ways to discredit the bio-statistical studies of human exposure to VCM when those studies do not support the Assistant Secretary's position. But both the government and the Unions are selective in this context to the point of serious distortion of the record. The government's brief on page 54 states that "the various bio-statistical studies were all flawed." Yet on page 53, in discussing experimental animal data, the brief cites the bio-statistical study performed by Dr. Selikoff and his colleagues on Goodyear's Niagara Falls employees in an attempt to strengthen animal data, without mentioning that the study falls

within its criticism of flawed studies.[4/]

Similarly, the Unions' brief (p. 11) cites only those bio-statistical studies which support its position that occupational exposure to VCM "uniformly" has caused higher incidence of multi-site cancers, without noting that studies for Diamond Shamrock (J.A. 1309-17); Air Products (J.A. 1032-36), and Firestone (J.A. 1917-19, 2692-93) did not show such results. Also, the government's misrepresentation of Firestone's studies of its PVC workers is an example of reprehensible advocacy which cannot be condoned by this Court. The government's brief states that "a study of Firestone's PVC workers revealed a statistically significant greater than expected mortality rate from lung cancer, digestive cancer and cardiovascular causes when compared to the total U.S. male population" (Br. 48-49).

4/ In commenting on the difficulties in diagnosing angiosarcoma, the government misrepresents the testimony of Dr. Paul Kotin with respect to his opinion concerning his observations of Air Products employees. Dr. Kotin stated that to the best of his knowledge, Air Products employees did not have angiosarcoma (Tr. 827; Supp.App.209). As an unbiased analysis of the record will clearly show, his comments with respect to diagnostic difficulties were directed at the sensitivity of medical testing procedures, not his opinion with respect to Air Products employees, which is the totally erroneous implication presented in the government's brief (Br. 54; see Tr. 827-28; Supp.App. 209-10). Of course, what the government refused to mention in connection with diagnostic difficulties was the testimony of Dr. Lloyd regarding the uncertainty surrounding verification of angiosarcoma in two employees who had worked in fabrication plants (J.A. 355-56).

That is simply false. The studies referred to by the government reported that "there was no significant increase in deaths from any specific malignancy in the exposed and non-exposed employees" (J.A. 1917). The government's brief totally ignores the truly significant findings of the Firestone study, which compared a group of employees exposed to VCM with another group of employees in Firestone's Pottstown tire plant who were not exposed to VCM. That finding is: "Comparison of the exposed employees with the non-exposed employees shows a slight excess in malignant neoplasms and a small deficit in major cardiovascular deaths in the exposed (Table 2)--neither statistically significant" (J.A. 1905; emphasis added).[4a/]

In addition, the government's treatment of the Tabershaw-Cooper report goes both ways. If the results support the Assistant Secretary's position, they are cited with approval (Br. 56), but if the results refute the Assistant Secretary's position, they are criticized (Br. 55). And the government's criticism with respect to one aspect of the record is totally unsupported. The government brief states that the Tabershaw-Cooper study "simply missed a number of the angiosarcoma of the liver deaths [sic]" (App. 2660). In fact, as inspection of the record reference provided, in addition to the text of the report itself unequivocally show all of the liver angiosarcoma deaths were found in the Tabershaw-Cooper study (J.A. 681, 2651). Furthermore, when the Tabershaw-Cooper and Dernehl study findings are considered

4a/ The government's reference to a finding that Firestone's PVC workers tended to die at an earlier age than others (Br. 4a) fails to inform the Court that Firestone's study showed that the median age of death of Firestone PVC workers is the same as that for non-exposed employees and that causes other than VCM were identified as accounting for the lower average age of death (J.A. 1917-1918).

in conjunction, as was the original intention (Tr. 531; Supp.App. 145), whatever criticisms the government is attempting to apply to them separately are completely refuted. Thus, the fact that the Tabershaw-Cooper study found no angiosarcoma deaths at the plants studied by Dr. Dernehl validates the ultimate conclusion of the latter study (J.A. 663):

> "The plants in which cases of angiosarcoma have been found have an employment of 1,188 persons. The finding of 13 [angiosarcoma] cases results in a ratio of one angiosarcoma for for each 91 employees. If these plants are the same as the plants in this survey the incidence of angiosarcoma should be in the same ratio and we should have found 21 cases. The fact that not one case was found cannot be ignored."

Similarly, Dr. Dernhel's study, which included all PVC plants 10 years or more in age at which no angiosarcoma deaths had occurred, and which found no significant differences in employee liver functions than would be expected in a group of employees subjected to 10-20 year exposures at exceedingly high concentrations validates the ultimate conclusions of the Tabershaw-Cooper study showing a favorable mortality experience for workers exposed to VCM in comparison with a U. S. male population (J.A. 657-64, 665-706).

For the same reasons, the government's spurious attempt to discredit Dr. Cook's study of living Dow employees must fail (Br. 56). Completely ignored by the government is

Dr. Holder's mortality study of Dow employees which examined a cohort of employees whose initial exposures occurred more than 20 years prior to commencement of the study. Thus, both studies considered in conjunction account for the mortality experience of employees' long-term exposures, as well as evaluate the present conditions of living employees. The fact that both studies revealed that exposures to concentrations less than 200 ppm caused no liver abnormalities or causes of death different from what would be expected in a non-exposed population (J.A. 1173-1200, 1282-1308) cannot be refuted by the simple expedient of refusing to mention one of the vital components of this two-part study.

Of course, the government's distortion of the record does not obscure the human tragedy of 13 confirmed deaths from VCM-induced angiosarcoma.[5/] Neither does it obscure the fact that the Assistant Secretary's determinations with respect to the permissible human exposure level are based almost exclusively on Dr. Schneiderman's statistical theories for extrapolating effects on animals to humans which are completely rejected by all other scientists in this record, a fact which the government

5/ The Unions' contention that the record supports VCM having a mutagenic and tertogenic effect on humans is completely unsupported by the record (Br. 12, n. 12). The Swedish study cited involved salmonella test systems, micro-organisms which do not possess metabolic systems similar to humans (J.A. 3169). Dr. Selikoff's references to investigations in Ohio were qualified by his own testimony, not cited by the Unions, to the effect that those investigations are preliminary, require confirmation and explanation because "we do not know, for example, whether vinyl chloride could have been the only chemical responsible for these observations" (J.A. 3088). Not mentioned by the Unions' is Dr. Gehring's study which shows that bred mice, rats and rabbits exposed up to 500 ppm VCM did not show a teratogenic response in their offspring (J.A. 2919-28, 3146).

does not dispute. Moreover, Dr. Baden undertook the risk-benefit analysis proposed by the Ad Hoc Committee on the Evaluation of Low Levels of Environmental Chemical Carcinogens, on which the Assistant Secretary purported to base his determinations, and concluded that a 50 ppm VCM exposure level would provide "appreciably less of a health risk than many other risks to health, industrial and otherwise, that our society has judged acceptable" (J.A. 2690).[6/]

The critical fallacy in the Assistant Secretary's medical and scientific determinations and repeated in the government's argument to this Court, is adoption of a position which requires that the permissible exposure level for humans to a carcinogen be set at essentially zero, despite all of the record evidence that higher permissible human exposure levels would not constitute an unacceptable risk. It is clear on this record that although VCM is a proper subject for government regulation, occupational exposures at present low levels achieved by industry are not dangerous to humans. Accordingly, the Assistant Secretary's

6/ Drs. Gehring and Dernehl concluded that a 50 ppm exposure level for humans would not constitute an unreasonable risk (J.A. 657-64, 1277), and Dr. J. Wister Meigs concluded that VCM exposure concentrations as high as 40 ppm, with phased reductions to 20 ppm over two years would be scientifically and medically reasonable (J.A. 2409-21). The statements in the Unions' brief that "not one company physician contended that there was some specific level above 1 ppm which would constitute a safe level for employee exposure to vinyl chloride" (Br. 49-50); that all experts were of "one mind" that the Assistant Secretary should establish a standard based upon the lowest measurable exposure level (Br. 44-45); and that there are no data to support a safe level of exposure (Br. 14, fn. 11) are all patently false.

determination to set the permissible exposure level for human exposure to VCM at 1 ppm averaged over any 8-hour period with a maximum of 5 ppm averaged over any 15-minute period are not supported by substantial evidence in the record considered as a whole.[7/] And neither does the fact that two employees in the fabricating industry, which includes over 1400 individual firms and hundreds of thousands of employees, have been observed with angiosarcoma, constitute substantial evidence to support setting the permissible exposure level at essentially zero. Two random cases in a population of hundreds of thousands do not even establish an identifiable trend, particularly in view of the findings of Drs. Popper and Thomas which categorized all but one of the highly publicized angiosarcoma cases observed during the Spring of 1974 in Connecticut individuals who had not worked in PVC plants and including fabrication workers as definitely not similar to VCM induced angiosarcoma (J.A. 2973-76). Indeed, it is not inconceivable that individual sensitivity (to which the extensive medical surveillance procedures mandated by the standard are directed) or exposure to other chemicals like inorganic arsenicals which produce a lesion identical to that involved with VCM induced angiosarcoma fully explains the angiosarcomas in the two fabrication employees.

7/ The Unions' apparent suggestion (Br. 42) that the Assistant Secretary may ignore debate surrounding diverse medical opinion in making determinations on scientific issues in promulgating a standard is supported by reference to the House of Representatives Conference Report No. 91-1291 in support of the Daniels Bill passed by the House but later rejected by the Senate. (See our brief on the merits, pp.53-54, n. 49; Legislative History at p. 831.) There is no legislative history in connection with the final version of Sec. 6(b)(5) supporting the Unions' position.

II.

THE GOVERNMENT'S ARGUMENTS WITH RESPECT TO TECHNOLOGICAL FEASIBILITY ARE CONTRARY TO THE EXPRESS LANGUAGE OF SECTION 6(b)(5) OF THE ACT, ARE POST HOC RATIONALIZATIONS OF APPELLATE COUNSEL NOT RELIED UPON BY THE ASSISTANT SECRETARY AND ARE DISTORTIONS OF UNCONTRADICTED RECORD EVIDENCE

The government's brief attempts to excuse the Assistant Secretary's failure to adopt a feasible vinyl chloride standard, as is required by his statutory mandate, by claiming that the Assistant Secretary has the right to impose "technological or action forcing" standards on industry regardless of technical and economic considerations. Despite the specific congressional direction in Section 6(b)(5) of the Act that occupational safety and health standards must be feasible and based on the best available evidence, the government, in effect, argues that the Assistant Secretary can justify any standard--no matter how infeasible--on the proposition asserted here for the first time that it will force industry to develop technological innovations to assure a safe working environment for employees.

The government's assertion of a "technologically forcing purpose" (Br. 77-85) as a justification for the final standard regulating exposure to VCM not only directly contravenes the express provisions of the Act but also, confirming the argument's repugnance to the statute, constitutes a post hoc

rationalization by appellate counsel not relied upon by the Assistant Secretary below in direct conflict with the Supreme Court's decisions in Burlington Truck Lines and Metropolitan Life Ins. Co. cited above.

The major premise of the government's assertion, and to which the brief devotes the most time, is dead wrong as a matter of law. Simply stated, the assertion is that the standard setting process of Section 6(b)(5) of the Act has, as its core requisite, a "technologically forcing purpose" because the Act was passed in 1970 contemporaneously with other general environmental legislation containing a "technologically forcing purpose" in standard setting. A careful review of the language and of the legislative history of the Act, the National Environmental Policy Act (42 U.S.C.A. §4321, et seq. (Supp. 1974)), the Clean Air Act Amendments of (42 U.S.C.A. §1857f-1(b)(1), et seq. (Supp. 1974); 42 U.S.C.A. §1857c-6, et seq. (Supp. 1974), the Automobile Safety Act of 1966 (15 U.S.C.A. 1381, et seq. (Supp. 1974),[8/] and the cases interpreting the legislation unambiguously demonstrates the total fallacy in the government's assertion.

First, Calvert Cliffs Coord. Com. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C.Cir. 1971), cited by the government at page 82 of its brief, makes it absolutely clear

8/ The government's brief, uncharacteristically, provides no citations to these statutes in the text or the table of contents. In view of the less than 48-hour period provided for the preparation and filing of reply briefs, a serious concern must be raised as to whether the government's purpose was to prevent petitioners and the Court from addressing themselves to the novel assertions made herein.

that the National Environmental Policy Act has no technology forcing purpose whatsoever. True, that Act is "action forcing" but the action forced is compulsion on each and every federal agency, not private parties, to consider "environmental values" in adopting policies (449 F.2d at 1112-13).

Second, the express language in Section 6(b)(5) of the Occupational Safety and Health Act of 1970 specifically mandating standards "to the extent feasible" and directing consideration of "the feasibility of the standards" clearly demonstrates "no technology forcing purpose" was incorporated therein. The government's citation (Br. 81) to a House Report as evidence of a legislative history supporting a "technologically forcing purpose"is simply dishonest. That House Report is House Report No. 91-1291 issued in support of the Daniels Bill (H.R. 16785), which specifically rejected any consideration of technological feasibility as a basis for setting a standard (Legislative History of the Occupational Safety and Health Act of 1970 (Subcommittee on Labor, Committee on Labor and Public Welfare, U.S.Sen. (1971), pp. 831-892)). As has already been shown (see our brief on the merits, pp. 53-54, n. 49), the Daniels Bill was rejected by the Senate. Senator Dominick's version of Section 6(b)(5) requiring standards to be feasible replaced the Daniels Bill and eventually became the existing language.

Third, when Congress did intend a "technologically forcing purpose" in environmental standard setting, it expressly so

provided by statute. As Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375, 391 (D.C.Cir. 1973), makes abundantly clear, Congress in deciding upon the final language of the Clean Air Act Amendments of 1970 expressly rejected language virtually identical to the language on feasibility specifically incorporated into Section 6(b)(5) of the Occupational Safety and Health Act.[9/] Even more important, Portland Cement also establishes that when a "technologically forcing purpose" exists, the "forcing" must involve projections "based on existing technology . . . and cannot be based on 'crystal ball' inquiry." (486 F.2d at 391). Finally, as also shown by International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C.Cir. 1973), when Congress established a "technologically forcing purpose" in an environmental statute, it also provided for a statutory "escape hatch" to allow a suspension of the "technologically forcing" standards if industry could not achieve them.[10/] That no suspension provision appears in the Occupational Safety and Health Act is convincing evidence that Congress never intended to force technology in standard setting under the Act.

9/ Senator Muskie's comments, quoted by the government (Br. 84), in support of the final language of the Clean Air Act Amendments, are diametrically opposed to the comments of Senator Dominick and then Senator Saxbe on the final language of Section 6(b)(5) with respect to the issue of whether standards must be technologically feasible.

10/ The government's brief (p.82) clearly misconstrues the suspension provisions of the Clean Air Act Amendments of 1970. The government contends that suspension of emission standards under Sec. 202(b)(5)D) (15 U.S.C. §1857f-1(b)(5)(D)) can occur only if available technology, that which might become available if industry used all good faith efforts, did not exist. Inspection of the statutory provisions, particularly Sec. 202(b)(5)(D)(iii) reveals that "good faith efforts" is nowhere used in defining the term "available technology".

Clearly "one must distinguish between prediction and prophesy" (478 F.2d at 642) and clearly the Assistant Secretary in this instance is involved in "prophesy" in the truest sense of the word.

Finally, as shown by Chrysler Corporation v. Dept. of Transportation, 472 F.2d 659 (6th Cir. 1972), the Automobile Safety Act of 1966 also differs significantly from the Act. Unlike the Act, that safety law in providing for a "technologically forcing purpose" specifically granted the Agency power to specify a later effective date for meeting a "technologically forcing" standard. And, such a power was specifically provided to insure against "economic and engineering impossibility" and to insure that a manufacturer is not "put out of business" (472 F.2d at 673).

In sum, the government's assertion of a "technologically forcing purpose" behind the standard setting process of the Act is nothing more than a bald attempt to rewrite and drastically change the carefully considered language of §6(b)(5) of the Act and the Congressional intent with respect thereto, an attempt which must be condemned by this Court. Indeed, it is also an attempt to write out the substantial evidence requirements as they relate to technological and economic feasibility.

But even if the Act did permit occupational safety and health standards to be "technologically forcing", it is clear that the Assistant Secretary did not assert that reason as a justification for his determination on technological feasibility. Instead, contrary to all the evidence (as shown in our main brief, pp.64-71 and again below), the Assistant Secretary concluded that he believed that in time the permissible exposure concentration could be maintained, and that some new technology "may" be required to do so. (39 Fed.Reg. 35892, J.A. 3) Such a conclusion carries no

recognition that a "technologically forcing" process is being invoked nor any intention of "forcing technology". Clearly, therefore, the Assistant Secretary has not relied on any so-called "technology forcing purpose" and government counsel's post hoc advocacy of such a purpose before this Court unambiguously contravenes Burlington Truck Lines and Metropolitan Life Ins. Co.

The theme of the government's brief which is comparable to the approach of the Assistant Secretary in adopting the final vinyl chloride standard is that no credence or weight should be given at all to the uncontroverted technical and economic evidence which conclusively demonstrated that the final standard is hopelessly infeasible. The brief does, however, attempt to give a colorable basis for the indefensible final standard by misconstruing or ignoring the overwhelming substantial technical and engineering evidence in the record which totally refutes any rational prediction that the 1 ppm exposure level can ever be achieved in the PVC industry based on the present state of the engineering and technological arts or even in the light of contemplated technical developments and innovations.

It is indeed noteworthy that the government failed to refer to any substantial technical record evidence in support of feasibility but instead solely relies upon a so-called "sensible safety factor" limiting man's exposure to 1/100 of the no-effect level in animals. Based on this "sensible safety factor", the

government's brief concludes that the only prudent course open to the Assistant Secretary was to reduce human exposures to the lowest measurable minimum, 1 ppm (Br. 87). This approach confirms that the Assistant Secretary selected the final standard independent of engineering or economic factors. According to the government's brief, justification for the Assistant Secretary's selection of the lowest measurable minimum was warranted primarily because vinyl chloride has caused human cancers which the government argues is substantial evidence enough to limit workers exposure to the absolute minimum (Br. 87). Thus, in effect, the government asserts the principle that an absolutely safe working environment is the Assistant Secretary's mandate regardless of technical and economic factors. This is, of course, repugnant to the express legislative history of the Act, the statutory mandate which requires standards to be feasible and the case authorities holding that the Assistant Secretary must take into consideration technical and economic factors when adopting a standard. Cf. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C.Cir. 1974).

Even the authorities relied upon by the government in arguing that the Assistant Secretary can adopt action compelling standards to coerce industry to innovate new technology recognize that standards predicated on predictions of what might be achievable in the future must be based on present engineering and

technological data justifying a rational conclusion that such goals are actually attainable. Arbitrary determinations unsupported by present technology will not support such a standard. Thus, as stated by the Court in Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375 (D.C.Cir. 1973):

> "The Administrator may make a projection based on existing technology, though that projection is subject to the restraints of reasonableness and cannot be based on 'crystal ball' inquiry. At 425 of 155 U.S.App.D.C., at 629 of 478 F.2d. As there, the question of availability is partially dependent on 'lead time', the time in which the technology will have to be available. Since the standards here put into effect will control new plants immediately, as opposed to one or two years in the future, the latitude of projection is correspondingly narrowed." (486 F.2d at 391-392)

It is also argued that the Assistant Secretary "was under no false illusions as to the effect which would be required for industry to engineer down to 1 ppm" and that it might take years for the PVC industry to achieve such a level (Government's Br. 88). The plain fact is that the expert engineering consultants retained by OSHA explicitly stated that the exposure level of the final standard was infeasible and not achievable at all based on present technology (J.A. 3584, 3589). The Snell report confirmed industry's technological studies to the same effect (see Firestone/Union Carbide Br. 35-36).

Moreover, the government's brief totally ignores the conclusions of the Snell study that adoption of a 1 ppm standard would place 100% of the industry in danger of being forced to close (J.A. 3587). Yet, that is the exposure level which will dictate every facet of the PVC industry after January 1, 1975 if the standard is confirmed. Indeed, even under other regulatory schemes a standard based on such infeasible and technically unrealistic projections will not be condoned. Thus, it was noted by the Court in Chrysler v. Dept. of Transportation, 472 F.2d 659 (6th Cir. 1972):

> "We do not intend to suggest that the Agency might impose standards so demanding as to require a manufacturer to perform the impossible, or impose standards so imperative as to put a manufacturer out of business." (472 F.2d at 672-673)

In an obvious attempt to offset the devastating effect of the Snell report, whch indeed conclusively confirmed industry's technological studies, the government speciously suggests that merely because industry has been able to effect substantial reductions in VCM exposures, the Assistant Secretary was justified in setting an untenable and unrealistic standard to induce further technical innovations (Government's Br. 89).[11/]

11/ This proposition which is repeated throughout the government's brief as well as the brief filed by the Unions, ignores the conclusion of the Snell report to the effect that at lower exposure levels it becomes increasingly more difficult to reduce VCM levels and that it cannot be predicted with certainty that a 10-15 TWA exposure level can be attained (J.A. 1095, 3585). Such a level, according to the Snell and industry studies, might be attainable in 4 or 5 years providing new technological and engineering techniques have been accomplished (J.A. 3587, 3 36, 1797-1816, 563, 570, 589, 1604-05). On the basis of evaluation of the present state of technology, it is obvious that the Assistant Secretary's "belief" as to future innovations is sheer speculation and prophesy.

The government's attempt to overcome the standard's technical infeasibility rests essentially on singling out and misconstruing questionable monitoring data and technical developments from atypical PVC plants not representative of the industry and which are refuted by the conclusions reached by the Snell report. The Snell report confirms that even management and support areas, which includes clerical positions are subject to average concentration levels of 1 ppm (J.A. 2581). This, of course, would result in such areas coming within the regulated areas defined by the final standard. Other job classifications are significantly higher resulting in average concentration levels far in excess of the permissible 1 ppm TWA. These averages are, however, recognized by Snell as probably being substantially below the true averages because of the monitoring systems employed. The Snell report indicates that its findings with respect to average exposure levels may be 60% less than the true exposures actually prevalent in industry facilities (Snell App. B-2).

The government's suggestion that there is a trend to a larger production unit which can reduce employer exposures to VCM concentrations is misleading and ignores the inherent differences in the PVC industry (Government Br. 42-43). Large reactor plants are designed to produce one type of PVC resin. A substantial portion of PVC facilities are engaged in the production of multiple product types which do not lend themselves to large reactor technology. Most significantly, however, the government failed to

include that part of the Conoco report which established that large reactor technology is not presently applicable to the PVC industry generally. The Conoco report expressly stated, "At the present time, large reactor technology is limited to a very specific range of resins which find application in the construction industry. These type of resins do not have rigorous requirements on several important PVC properties". The report also notes that a 5-year lead time is necessary to implement technology required to satisfy market demands (J.A. 3613-3614). These facts, of course, were not referred to in the government's brief.[12/]

The government's brief, in the most reprehensible fashion has misstated the record in an attempt to induce this Court to believe that Firestone failed to cooperate with OSHA at the hearings, which resulted in confusion and a lack of understanding of Firestone's technological, economic and medical data. The government's brief (p. 41) states that Firestone refused to provide counsel for the government and OSHA personnel with copies of Firestone's extensive written presentation when requested, thus effectively precluding useful cross-examination. This blatant misstatement is not only

12/ In typical fashion, the government misstated the Firestone data and its efforts to reduce employee VCM exposures. Firestone's testimony during the hearings specifically noted that Firestone had installed new reactor cleaning processes which reduced the necessity for employee reactor entry for cleaning purposes to once a month, exactly that which the Conoco report suggest is the result of employing large reactor technology. All 65 reactors at Firestone's plant have been equipped with such equipment and similar equipment has been purchased for Firestone's Perryville plant (J.A. 1993). Despite the fact that Firestone has already committed in excess of $200,000 for reactor cleaning systems at its Pottstown plant alone, such systems have merely enabled Firestone to meet the 50 ppm of the emergency standard (Ex. 199(b); App. A-3).

refuted by the record but also by the extensive cross-examination of the Firestone witnesses by OSHA's counsel at the hearings.[13/] The quotations appearing in footnote 14 at page 41 of the government's brief excludes the statement made by OSHA's chief counsel after the recess just prior to which the request was made which totally refutes the government's untenable claim here that Firestone's written presentation was not submitted to OSHA as requested.

At the resumption of the hearings, chief counsel for OSHA expressly aknowledged for the record that OSHA had been given copies of the Firestone presentation. Thus, at page 1679 of the official transcript, Mr. Kline stated:

> "JUDGE MYATT: All right. Ladies and gentlement, the Firestone presentation.
>
> "MR. KLINE: I'd like the record to reflect we were supplied with copies of their presentation in advance."

This acknowledgment, absent from the colloquy included in the government's brief, manifests the government's unwarranted attempts to discredit Firestone's technological and economic data.

The government's incredible attempt to distort the evidence presented by Firestone is equally refuted by the record references which the government either deliberately ignored or

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13/ The record reflects that the cross-examination to which the Firestone witnesses were subjected was the most extensive and substantial of any party presenting evidence at the hearings.

failed to read. For example, the government attempts at pages 39 through 41 of its brief to convey the impression that Firestone's statement that it was in compliance with the 50 ppm ceiling of the ETS was contradicted by the Firestone technological data which indicated that substantial capital expenditures would be required to meet a 50 ppm ceiling. In making this assertion, the government ignored the repeated statements made by the President of Firestone Plastics Company at the hearings as well as the written statements contained in Firestone's written submission and which were to the effect that in order to achieve--on a permanent basis through the installation of engineering controls--a 50 ppm exposure level, massive capital expenditures would be required (J.A. 1686-7; Ex. 199(b), App. A-4). It was repeatedly stated that the Firestone capital cost data was predicated on the assumption that the final standard "regardless of the vinyl chloride exposure level selected would include the necessity of permanent engineering controls in all areas and will only allow the use of respiratory equipment on an interim basis." (J.A. 1686-7; Ex. 199 (b), App. A-4)

Firestone's evidence also expressly noted that the capital investments which would be required to meet the 50 ppm ceiling on a permanent basis through engineering controls was predicated on two different estimates, one made by an independent engineering consulting firm, and the other by Firestone's engineering staff. The $10,000,000 capital investment to meet the 50 ppm ceiling which

was specified by Catalytic, Inc., Firestone's independent engineering consultant firm. The $7,000,000 estimate to achieve such levels was that determined by Firestone's staff. The distinction between the two estimates was repeatedly referred to in Firestone's written presentation as well as the oral testimony given by its witnesses during the hearing. (See, e.g., J.A. 1682-83, 1744, 1749, 1752, 1754-57.)

Despite the fact that the Snell report's case study of a PVC pilot plant confirmed Firestone's estimates of the capital costs which would be incurred in attempting to achieve a 10 ppm-25 ppm ceiling (Firestone/Union Carbide brief, fn. 21, p. 47), the government's brief suggests that Firestone's cost projections were consistently high. Again, the government's brief ignores the evidence with respect to the economic consequences of the proposed standard. The capital cost estimates determined by Firestone and its independent engineering consultants are predicated on the basis that full compliance and on implementation of the engineering controls and work practice methods specified in the proposed permanent standard would be required regardless of exposure level ultimately selected (J.A. 1690).[14/]

14/ The evidence established that Firestone was in compliance with the ETS through the use of respirators. However, not all employees were supplied with individual respiratory equipment. Thus, to comply with a permanent standard, respiratory protection would have to be provided for each employee in the complex (J.A. 1788). For that reason, the 60 air-supplied respirators specified at the Pottstown complex were necessary in order to supplement the respiratory devices supplied under the ETS for those employees exposed to excursions above the 50 ppm ceiling (Tr. 1788, 1814).

The government's unwarranted comments here with respect to the evidence presented by Firestone during the proceedings below are in stark contrast to the acknowledgment by OSHA's chief counsel during the hearings. Thus, the Assistant Solicitor primarily responsible for representing OSHA stated:

> "MR. KLINE: Gentlemen, I am aware that you have furnished--first, I would like to say that this is the most thorough job I have ever seen anywhere on anything, * * *."
> (J.A. 1980)

Obviously, in an attempt to overcome the absence of any substantial technical evidence supporting the final standard and in order to distort the substantial and overwhelming technical evidence submitted by industry which was confirmed by the Snell report, the government has resorted to petty tactics, including record distortions, which should not be condoned by this Court.

III.

THE GOVERNMENT'S ARGUMENT THAT THE STANDARD IS TECHNOLOGICALLY FEASIBLE BECAUSE OF THE STANDARD'S RESPIRATOR PROVISIONS IS NOT SUPPORTED BY ANY RECORD EVIDENCE AND IS DIRECTLY CONTRARY TO THE RECORD EVIDENCE

The government and the Unions have both consistently ignored the fundamental issues involving the kind of full time respirator use that must follow upon the implementation of the permissible exposure limits in the standard. These issues are of paramount importance and clearly demonstrate that such continuous respirator use is infeasible and that the Assistant Secretary cannot circumvent the lack of necessary technological feasibility by resort to a full-time respirator use alternative.

Government's counsel refers to the Snell report's survey of respirator cost and availability for the purpose of demonstrating that respirators are currently available (Br. 65). Yet, counsel has omitted the Snell report's crucial qualification that "[i]f sudden orders were placed for 500 to 700 of these units" there could be a lead time of "up to 40 weeks" (J.A. 3565).[15/]

Government's counsel also places great emphasis upon a remark elicited from Dr. Tomashefski upon cross-examination that

15/ See, also, page 7 of the affidavit of Dr. Robert Brookman (Ex. B to Firestone's Motion for Stay, now pending before this Court) in which he states: "The minimum delivery time on any units purchased in small quantities is 3 months and in the quantities required by Firestone, 6 months or longer." Furthermore, Dr. Brookman also ascertained that certain respirator units provided for in the standard do not exist or are unsafe. Consequently, the implication of [cont'd]

he considered it feasible that a respirator could be designed for long-term wear (Government Br. 67; Tr. 319-20; Supp.App. 107-08). Even a superficial examination of Dr. Tomashefski's remark reveals, however, that he was clearly speaking in terms of the future and in no way contradicted or qualified his earlier statement that "the use of respirators for full-time protection in vinyl chloride and polyvinyl chloride production facilities is unsafe and infeasible" (J.A. 535).

Government's counsel also baldly state that: "Worker acceptance will be forthcoming", citing testimony at the hearings by two union officers (Br. 71). Such an assertion is patently refuted by substantial expert evidence of worker resistance to respirators. See, e.g., Mr. Oelfke of Dow (J.A. 1120); Dr. Tomashefski (J.A. 538-539); Dr. Hyatt (J.A. 286).

In their briefs, the government (p. 71) and the Unions (pp. 52-53) argue that the monitoring data indicates that only a relatively small portion of industry employees will be required to wear respirators on a continuous basis. The fallacy of this argument has been amply refuted elsewhere in this brief, supra, page 22 , wherein we demonstrate that the monitoring data is

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fn. 15 cont'd: the government's brief (pp. 61-63) that an employer has great latitude in respirator selection is totally false, because many of the units are non-existent or unsafe. Finally, the respirator provisions of the standard defy any logic in one important respect. Although the implicit assumption in the respirator table is that exposure in excess of 100 ppm VCM is "immediately hazardous to life (because auxiliary air tanks are generally required for such exposures) the respirator table now permits use of one type of respirator without auxiliary air tanks for exposures in excess of 100 ppm.

misapplied, misinterpreted, and biased downwards.[16/]

The most glaring omission on the part of both the government and the Unions pertains to their refusal to address themselves to the fact that not only is there no evidence in the record that continuous respirator use is feasible, but, indeed, the evidence is overwhelming in its demonstration that such use is, in fact, both hazardous and infeasible for the VCM-PVC industries. (See main brief, pp. 42-45).[17/]

Thus, use of respirators for extended periods of time can only lead to a plethora of accidents, physiological and psychological problems, unnecessarily extended emergencies, and, most certainly, fatalities. These hazards are neither problematical nor conjectural. They are very real, inevitable hazards that VCM and PVC workers will be subjected to because the Assistant Secretary has simply ignored the evidence presented to it and has attempted to avoid the issue of technological infeasibility by resorting to respirators as an alternative. But as the evidence clearly demonstrates, full-time use of respirators is, in itself,

16/ The Unions' brief (p. 36-37) argues that respirator use in PVC plants is now occurring without undue difficulty and cites testimony of industry representatives in support thereof. An examination of that testimony reveals, however, that industry representatives were addressing themselves to respirator use at a permissible exposure level of 50 ppm, when full-time use of respirators would not be required (J.A. 586, 776-77, 788, 1346).

17/ Utilization of several different respirator manufacturers suggested by the government to achieve comfortable fits for employees (Br.65) is naive and totally impractical because different manufacturers use different types of replacement parts and training methods.

infeasible and highly dangerous. Long-term use of respirators can never be a substitute for technological infeasibility. As Dr. Hyatt has stated: "At best, any of these devices are an instrument of torture" (Tr. 92/14).

IV.

THE GOVERNMENT'S CONTENTION THAT THE ISSUE OF ECONOMIC FEASIBILITY WAS WAIVED IMPROPERLY IGNORES THE ASSISTANT SECRETARY'S MANDATE TO CONSIDER ECONOMIC FEASIBILITY IN PROMULGATING A STANDARD AND IMPROPERLY IGNORES SUBSTANTIAL EVIDENCE IN THE RECORD WITH RESPECT TO THE ECONOMIC INFEASIBILITY OF THE STANDARD

The assertion by the government in its brief (p. 73) that the issue of economic feasibility is "non-existent" is patently absurd. In support of this outrageous assertion, the government refers to the statement of Mr. Anton Vittone, President of B. F. Goodrich Chemical Company, that: "* * * we [Goodrich and SPI] do not claim economic feasibility" (Tr. 1186; Supp.App. 299; Government Br. 74). The government's erroneous contention fails on several grounds.

First, Mr. Vittone, despite the government's statement to the contrary, hardly speaks for "* * * all segments of the industry at large * * *" (Government Br. 74).[18/] He specifically articulated this fact when he stated that: "My statement represents the views of the majority of the [VCM-PVC] Committee [of SPI], however, different positions will be expressed on certain sections of the proposed permanent standard by industry members" (J.A. 545). Moreover, in order to make such an assertion, it was necessary for the government to ignore extensive evidence presented by Firestone (J.A. 1665, et seq.), Uniroyal (J.A. 1565-71), General Motors (J.A. 2355-61), American Footwear Industries Association (J.A. 1642-64), Health Industries Association and the Medical Surgical Manufacturers

18/ Furthermore, Mr. Vittone later qualified his position with regard to economic feasibility, stating that he would not consider a standard feasible that would shut down the industry (Tr. 1187; Supp. App. 300).

(Ex. 16), National Association of Food Chains (Ex. 58(a)), PVC Belting Manufacturers Committee (Tr. 200-203), and many other industry spokesmen vitally concerned with the economic ramifications of an unreasonable VCM emission standard.[19/]

Second, the government's contention that economic feasibility is a "non-existent" issue is ludicrous in light of the fact that OSHA itself either conducted or commissioned three different economic feasibility studies: the Final Environmental Impact Study (J.A. 3260, et seq.), the Economic Impact and Technological Feasibility Study for the Compounders, Processors and Fabricators of Polyvinyl Chloride Resins (OSHA Office of Planning, Evaluation and Research) (J.A. 2979, et seq.), and the Snell Report (J.A. 3433, et seq.)

Finally, it is irrelevant whether or not industry raised issues of economic feasibility in view of OSHA's mandate to "include problems of economic feasibility" in its standard-promulgating processes. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 477 (D.C. Cir. 1974).[20/]

The government makes two additional erroneous points under the "non-existent" issue of economic feasibility. It attacks the

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19/ See also, Ex. 4 (Nos. 363, 367, 368, 371, 372, 441, 442, 445, 446, 447, 448, 470, 472, 474, 478, 484, 787, 491, 744, 508, 510, 515, 522, 524, 527, 531, 539, 540, 544, 545, 546, 548, 549, 550, 551, 552), Exs. 16, 17, 19, 29, 30, 40, 41, 44, 45, 49, 51, 52, 55, 56, 58, 61, 62, 63, 67, 69, 72, 73, 74, 75,77, 82, 84, 88, 89,91, 93, 102, 128.

20/ Moreover, this mandate was clearly recognized by OSHA. See statement by Daniel Boyd, Director of Office of Standards Development, OSHA that OSHA recognized that "economic considerations" as well as technological considerations were factors in the determination of the feasibility of a new standard (J.A. 178).

Arthur D. Little, Inc. ("ADL"; J.A. 2585, et seq.) economic impact study on the ground that that study assumes that there will be a complete shutdown of the PVC industry without asking if the proposed standard would in fact result in such a shut down (Government Br. 74). ADL is an economic consulting firm. Its protocol did not include the question whether industry would in fact close down because that was not an economic question; rather, it was an engineering question that was outside of ADL's expertise. The question of whether industry would in fact close down was, however, amply addressed by the substantial engineering data submitted by industry and the OSHA commissioned Snell report, all of which concluded that industry would, indeed, have to shutdown if a 0-1 ppm standard were promulgated.[21/]

The government's brief also completely misinterpreted the Firestone data. First, the government states that Firestone's "cost estimates were considered consistently high by Snell" (Government Br. 75), thereby ignoring the Snell case study data which substantially corroborated the Firestone computations. (See main brief, p. 47, n. 41.) Then, the government states that Firestone "would remain profitable even if it were to spend $50 million to meet whatever standard the Secretary of Labor might impose" (Government Br. 76). Such an assertion is manifestly unfounded and is clearly refuted by Todd Walker, President of Firestone Plastics Company during the hearings (J.A. 1991):

21/ See, e.g., Mr. Oelfke of Dow (J.A. 1047-48), the final Snell report (J.A. 3584), OSHA's Division of Program Evaluation and Research (J.A. 2983, main brief, p. 38, n. 33). See also, main brief, pp. 35-38.

"MR. WALKER: * * *

I think what you are getting around to, I assume, is that we will charge more for the resin which will then repay for the investment. That is only true if the market will bear it.

* * *

"Let us suppose that the newer plants don't have to spend the $50 million. Let us suppose the plants in the southwest and the west don't spend $50 million, and let us suppose we raise our price five cents a pound, and the rest of the world doesn't. We are not going to get it."

In concluding that economic feasibility is a "non-existent" issue, government's counsel joins the Assistant Secretary in ignoring the extensive and highly relevant economic data. Contrary to its mandate, the Assistant Secretary has disregarded necessary issues pertaining to the costs of attempted compliance, the impact on an already unstable domestic economy, and the ability of our national industry to compete in the future on an international level.

V.

PURSUIT OF THE VARIANCE PROCEDURE ON THE ASSISTANT SECRETARY'S INVITATION DOES NOT LESSEN THE IRREPARABLE AND IRREVERSIBLE HARM SUFFERED BY FIRESTONE AND UNION CARBIDE IF A STAY IS NOT GRANTED

Contrary to the position expressed by the government's brief (pp. 108-09), Firestone and Union Carbide will suffer prejudice and irreparable harm if a stay is not granted by this Court, by pursuing the Act's variance procedure at the Assistant Secretary's specific invitation, in lieu of a stay of the entire standard

In the first place, the Assistant Secretary's invitation with respect to granting variances from the new standard applies only to the difficulties individual applicants have experienced in obtaining respirators. That invitation, apparently, will not extend to applications seeking variances because of the technological impossibility of achieving the permissible exposure limit solely by engineering controls. As a result, Firestone and Union Carbide will still be forced to spend inordinate amounts in capital expenditures, still be forced to develop programs to achieve unknown and unknowable "practicable" exposures, still not be capable of achieving the permissible exposure level, and still, therefore, be subject to penalties for continuing violations of the Act. Similarly, all of the other provisions of the standard will apparently not be affected by the Assistant Secretary's invitation for variance application.

Second, the Assistant Secretary's invitation for variance applications apparently also does not intend to deal with the intractable difficulty with this standard raised by Union Carbide in connection with the broad coverage of the standard to include trucks, railroads, warehouses and other areas regulated by the Department of Transportation and the inability of Union Carbide to secure transportation and storage of its PVC products after January 1, 1975. Even if variances dealing with the problems of respirators were applied for and granted, Union Carbide, and others, would still suffer irreparable harm because of an inability to transport and store products after January 1, 1975.

The suggestion in the government's brief (p. 109) that Firestone and Union Carbide could renew their motions for stay before this Court if their applications for variances were denied by the Assistant Secretary demonstrates the sheer exercise in futility which the government proposes as a defense to the stay motions. Both Firestone and Union Carbide have already filed a motion to stay with the Assistant Secretary and Union Carbide filed a supplemental request specifically referring to the overbreadth of the standard's coverage in connection with transportation and storage. The Assistant Secretary has not even acknowledged receipt of these documents.

Therefore, for the foregoing reasons and for the reasons expressed in their motions to stay herein, Firestone and Union Carbide

respectfully request a stay of the effective date of the standard regulating exposure to VCM pending this Court's decision on the merits.

VI.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our original brief and in our motions for stay, a stay of the final standard regulating exposure to vinyl chloride pending this Court's decision on the merits should be granted, and, on the merits, the petitions for review should be granted and the standard vacated and remanded to the Assistant Secretary for further proceedings.

Respectfully submitted,

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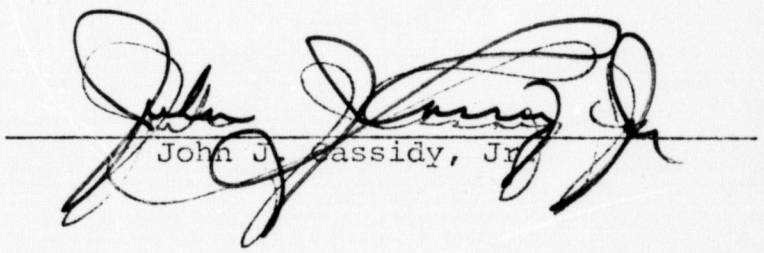

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